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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Darren Jay Walther,

10 Plaintiff,

11 v.

12 Commissioner of Social Security  
13 Administration,

14 Defendant.  
15

No. CV-18-02720-PHX-SMB

**ORDER**

16 At issue is the denial of Plaintiff Darren Jay Walther's Application for Disability  
17 Insurance Benefits by the Social Security Administration under the Social Security Act  
18 (the Act). Plaintiff filed a Complaint (Doc. 1) seeking judicial review of that denial, and  
19 the Court now addresses Plaintiff's Opening Brief (Doc. 13, Pl. Br.), Defendant Social  
20 Security Administration Commissioner's Response (Doc. 14, Def. Br.), and Plaintiff's  
21 Reply (Doc. 23, Reply). The Court has reviewed the Administrative Record (Doc. 11, R.)  
22 and now reverses the Administrative Law Judge's (ALJ) decision (R. at 15–35).

23 **I. BACKGROUND**

24 Plaintiff applied for Disability Insurance Benefits on August 12, 2014, alleging a  
25 period of disability beginning October 1, 2013. (R. at 18.) Plaintiff's claim was denied  
26 initially and on reconsideration. (R. at 18.) On December 15, 2016, Plaintiff appeared and  
27 testified at a hearing before the ALJ. (R. at 18.) On August 24, 2017, the ALJ denied  
28 Plaintiff's claim. (R. at 15–35.) That decision became final on June 29, 2018, when the

1 Appeals Council denied Plaintiff's request for review. (R. at 1–6.) The present appeal  
2 followed.

3 The Court has reviewed the medical evidence in its entirety and finds it unnecessary  
4 to provide a complete summary here. The pertinent evidence will be discussed in  
5 addressing the issues raised by the parties. In short, upon considering the medical records  
6 and opinions, the ALJ evaluated Plaintiff's disability based on the following severe  
7 impairments: "lumbar degenerative disc disease status post two fusions with hardware  
8 fractures and post laminectomy syndrome, sacroiliitis and shoulder osteoarthritis and  
9 degenerative joint disease." (R. at 20.)

10 The ALJ ultimately concluded Plaintiff was not disabled during the relevant period.  
11 (R. at 15–35.) The ALJ found that Plaintiff did "not have an impairment or combination of  
12 impairments that meets or medically equals the severity of one of the listed impairments in  
13 20 CFR Part 404, Subpart P, Appendix 1." (R. at 23.) The ALJ also found that Plaintiff had  
14 the residual functional capacity (RFC) to perform light work as defined in 20 C.F.R.  
15 § 404.1567(b) with some exceptions, including: standing and walking for four hours in an  
16 eight-hour workday; sitting for six hours in an eight-hour workday; frequently climbing  
17 ramps and stairs, but never climbing ladders, ropes, and scaffolds; frequently balancing,  
18 kneeling, and bilaterally reaching overhead; occasionally stooping, crouching, and  
19 crawling; and avoiding exposure to hazards, including unprotected heights and moving  
20 machinery. (R. at 23.) Based on his RFC, the ALJ found that Plaintiff was unable to  
21 perform his past relevant work but could perform jobs that exist in significant numbers in  
22 the national economy. (R. at 28.)

## 23 **II. LEGAL STANDARD**

24 In determining whether to reverse an ALJ's decision, the Court reviews only those  
25 issues raised by the party challenging the decision. *See Lewis v. Apfel*, 236 F.3d 503, 517  
26 n.13 (9th Cir. 2001). The Court may set aside the Commissioner's disability determination  
27 only if the determination is not supported by substantial evidence or is based on legal error.  
28 *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is more than a

1 scintilla, but less than a preponderance; it is relevant evidence that a reasonable person  
2 might accept as adequate to support a conclusion considering the record as a whole. *Id.* To  
3 determine whether substantial evidence supports a decision, the Court must consider the  
4 record as a whole and may not affirm simply by isolating a “specific quantum of supporting  
5 evidence.” *Id.* Generally, “[w]here the evidence is susceptible to more than one rational  
6 interpretation, one of which supports the ALJ’s decision, the ALJ’s conclusion must be  
7 upheld.” *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (citations omitted).

8 To determine whether a claimant is disabled for purposes of the Act, the ALJ  
9 follows a five-step process. 20 C.F.R. § 404.1520(a). The claimant bears the burden of  
10 proof on the first four steps, but the burden shifts to the Commissioner at step five. *Tackett*  
11 *v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). At step one, the ALJ determines whether the  
12 claimant is presently engaging in substantial gainful activity. 20 C.F.R. § 404.1520(a)(4)(i).  
13 If so, the claimant is not disabled and the inquiry ends. *Id.* At step two, the ALJ determines  
14 whether the claimant has a “severe” medically determinable physical or mental  
15 impairment. 20 C.F.R. § 404.1520(a)(4)(ii). If not, the claimant is not disabled and the  
16 inquiry ends. *Id.* At step three, the ALJ considers whether the claimant’s impairment or  
17 combination of impairments meets or medically equals an impairment listed in Appendix  
18 1 to Subpart P of 20 C.F.R. Part 404. 20 C.F.R. § 404.1520(a)(4)(iii). If so, the claimant is  
19 automatically found to be disabled. *Id.* If not, the ALJ proceeds to step four, where he  
20 assesses the claimant’s RFC and determines whether the claimant is still capable of  
21 performing past relevant work. 20 C.F.R. § 404.1520(a)(4)(iv). If so, the claimant is not  
22 disabled and the inquiry ends. *Id.* If not, the ALJ proceeds to the fifth and final step, where  
23 he determines whether the claimant can perform any other work in the national economy  
24 based on his RFC, age, education, and work experience. 20 C.F.R. § 404.1520(a)(4)(v). If  
25 so, the claimant is not disabled. *Id.*

### 26 **III. ANALYSIS**

27 Plaintiff raises three arguments for the Court’s consideration: (1) the ALJ erred by  
28 rejecting the opinion of Plaintiff’s treating physician; (2) the ALJ erred by rejecting

1 Plaintiff's symptom testimony; and (3) the proper remedy is to remand Plaintiff's claim for  
 2 payment of benefits. The Court finds that the ALJ committed reversible error and remands  
 3 Plaintiff's claim for further proceedings.

4 **A. The ALJ erred because he did not provide specific and legitimate**  
 5 **reasons for rejecting the opinion of Plaintiff's treating physician.**

6 Plaintiff's treating physician, Dr. Jalal Abbas, M.D., completed a treating source  
 7 statement in November 2016, in which he opined that Plaintiff could sit, stand, and walk  
 8 for one hour each in an eight-hour workday; never climb stairs, ramps, ladders, or scaffolds;  
 9 never crouch; occasionally balance; rarely stoop, kneel, and crawl; and never be around  
 10 unprotected heights and moving machinery. (R. at 541–42.) Dr. Abbas also opined that  
 11 Plaintiff would be off task more than 25 percent of a typical workday and absent from work  
 12 more than four days per month. (R. at 539.) The ALJ gave partial weight to Dr. Abbas's  
 13 opinion to the extent it was consistent with "the light exertional level found in the [RFC]  
 14 reached herein." (R. at 27.) The ALJ gave no weight to the concentration and absence  
 15 limitations because they were "overly restrictive and incongruent" with other evidence of  
 16 record. (R. at 27.) The Court finds that the ALJ's rationale was insufficient.

17 In general, the opinion of a treating physician should be given controlling weight.  
 18 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). If the treating physician's opinion is  
 19 controverted by another medical opinion, the ALJ may disregard it by providing specific  
 20 and legitimate reasons that are supported by substantial evidence. *Murray v. Heckler*, 722  
 21 F.2d 499, 502 (9th Cir. 1983). "The ALJ can meet this burden by setting out a detailed and  
 22 thorough summary of the facts and conflicting clinical evidence, stating his interpretation  
 23 thereof, and making findings." *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).

24 The ALJ's finding that Dr. Abbas's opinion was entitled to partial weight because  
 25 of its inconsistency with Plaintiff's RFC is not specific and legitimate. When calculating a  
 26 claimant's RFC, the ALJ must consider all relevant evidence, *i.e.* that which has not been  
 27 properly discredited. 20 C.F.R. § 416.945. Here, the ALJ's stated reason for giving partial  
 28 weight to Dr. Abbas's opinion was insufficient and circular. *See Laborin v. Berryhill*, 867

1 F.3d 1151, 1154–55 (9th Cir. 2017). First, it indicates that the ALJ put the cart before the  
2 horse by calculating Plaintiff’s functional capacity before considering his treating source’s  
3 opinion regarding his limitations. Second, because the ALJ gave no other reason for  
4 rejecting the physical limitations assessed by Dr. Abbas, it reflects that the ALJ failed to  
5 consider relevant opinion evidence when calculating Plaintiff’s RFC. In doing so, the ALJ  
6 inverted his responsibilities of (1) determining the weight of the evidence *before* (2)  
7 determining the claimant’s RFC. *See Trevizo v. Berryhill*, 871 F.3d 664, 678 n.6 (9th Cir.  
8 2017).

9 The ALJ’s error could be harmless if substantial evidence supports his rejection of  
10 Dr. Abbas’s opinion. *See Laborin*, 867 F.3d at 1155. Defendant concedes that the ALJ did  
11 not clearly articulate his rationale for rejecting the opinion, but argues that reasonable  
12 minds can infer it was because of its inconsistency with other medical opinions. (Def. Br.  
13 at 18.) Defendant explains that because Plaintiff’s RFC is supported by substantial  
14 evidence and stands in conflict with Dr. Abbas’s opinion, the ALJ was not required to  
15 accept Dr. Abbas’s opinion. (Def. Br. at 18.) The Court is not persuaded. First, Defendant’s  
16 logic does not address or resolve the ALJ’s procedural misstep in evidently calculating  
17 Plaintiff’s RFC before considering all of the evidence. Second, though the Court is  
18 permitted to draw reasonable inferences from the ALJ’s opinion, it may only do so if the  
19 ALJ has discussed the evidence and stated the reasons upon which his decision is based.  
20 *See Magallanes*, 881 F.2d at 751. In this case, the ALJ failed to state or even suggest  
21 through his discussion of the evidence that he rejected Dr. Abbas’s opinion because of its  
22 inconsistency with the other medical opinions. Accordingly, Defendant’s argument fails.

23 Nor does the Court find that substantial evidence supports the ALJ’s rejection of Dr.  
24 Abbas’s opinion. The ALJ rejected the assessed concentration and absence limitations  
25 because of their inconsistencies with other evidence, including Plaintiff’s ability to  
26 concentrate during his consultative evaluation, act appropriately in public settings, get  
27 along with others, and score a 29/30 on the MMSE. (R. at 27.) However, this rationale  
28 applies to a narrow portion of Dr. Abbas’s opinion, and therefore, it cannot serve as

1 substantial evidence to support a rejection of his entire opinion. The Court declines to  
2 consider the sufficiency of this rationale as applied to the concentration and absence  
3 limitations because the ALJ will be required to reevaluate Dr. Abbas's opinion on remand.

4 In sum, the Court finds that the ALJ committed reversible error in rejecting Dr.  
5 Abbas's opinion.

6 **B. The ALJ did not err by rejecting Plaintiff's symptom testimony.**

7  
8 Plaintiff testified regarding his pain and limitations in a February 2015 function  
9 report and at his December 2016 hearing. He reported that his average pain level is 8/10,  
10 with 10 being the "worst pain imaginable." (R. at 64.) He testified that he can sit for 10  
11 minutes at one time; stand for 10 to 15 minutes at one time; walk up to 500 feet at one time;  
12 and lift five to eight pounds total. (R. at 66.) His medication causes fatigue and makes it  
13 difficult for him to focus and concentrate. (R. at 68.) He has difficulty grooming and  
14 dressing himself, specifically putting on socks and shoes. (R. at 68–69.)

15 The ALJ rejected Plaintiff's symptom testimony for two reasons. First, the daily  
16 activities he testified about were inconsistent with his alleged limitations. (R. at 25–26.)  
17 Second, the objective medical evidence did not support his alleged limitations. (R. at 24–  
18 25.) The Court finds that the ALJ's rationale was sufficient.

19 Credibility is the province of the ALJ, but an adverse credibility determination  
20 requires the ALJ to give "specific, clear and convincing reasons for rejecting the claimant's  
21 testimony." *Treichler v. Comm'r of Soc. Sec.*, 775 F.3d 1090, 1102 (9th Cir. 2014) (citing  
22 *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996)). The ALJ may consider whether the  
23 record includes objective medical evidence to support the claimant's testimony, but that  
24 cannot form the sole basis for an adverse credibility finding. *Burch v. Barnhart*, 400 F.3d  
25 676, 681 (9th Cir. 2005). The ALJ may also consider the claimant's daily activities, course  
26 of treatment, and inconsistent statements. *Id.*

27 In considering whether a claimant's daily activities are inconsistent with his alleged  
28 limitations, the ALJ must determine the extent to which the claimant engages in those

1 activities to properly rely on them as evidence that he is more functional than alleged.  
2 *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); *Zavalin v. Colvin*, 778 F.3d 842,  
3 848 (9th Cir. 2014).

4 Here, the ALJ concluded that Plaintiff's daily activities were inconsistent with his  
5 alleged "difficulty concentrating, remembering, paying attention, completing task[s], and  
6 understanding." (R. at 26.) To support this finding, the ALJ noted that Plaintiff cares for  
7 his disabled mother, drives, cooks, cleans, and grocery shops. (R. at 25.) The ALJ further  
8 noted that Plaintiff applied to four or five jobs per week in 2013 and 2014. (R. at 25.)  
9 Finally, the ALJ noted that Plaintiff continues to socialize with friends and family as  
10 evidenced by his phone use, video game play and attendance at his aunt's birthday party at  
11 Red Lobster five days before the hearing. (R. at 25–26.)

12 The ALJ also explained how claimant's subjective complaints were not supported  
13 by objective medical evidence. Though an ALJ may consider whether a claimant's  
14 testimony is supported by objective evidence, a mere lack objective support is insufficient  
15 to reject the claimant's testimony. *See Burch*, 400 F.3d at 680–81. However, a conflict  
16 between subjective complaints and medical evidence is permissible where the ALJ  
17 provides other reasons as well. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).  
18 Here, the ALJ considered other reasons for discounting the subjective complaints and then  
19 listed how the subjective complaints were also inconsistent with the objective medical  
20 evidence. The ALJ cited to the x-rays, MRI findings, and physical examination findings.  
21 Accordingly, the Court finds that the ALJ's rejection of Plaintiff's symptom testimony is  
22 supported by substantial evidence.

23 **C. The proper remedy is to remand for further proceedings.**

24 Plaintiff asks the Court to remand his claim for payment of benefits. The credit-as-  
25 true rule applies if three elements are present. *Garrison*, 759 F.3d at 1020. First, the record  
26 must be fully developed such that further administrative proceedings would not be useful.  
27 *Id.* Second, the ALJ must have failed to provide legally sufficient reasons for rejecting  
28 evidence. *Id.* Third, "if the improperly discredited evidence were credited as true, the ALJ



1 would be required to find the claimant disabled on remand.” *Id.* Even if all three elements  
2 of the credit-as-true rule at met, the Court maintains “flexibility to remand for further  
3 proceedings when the record as a whole creates serious doubt as to whether the claimant  
4 is, in fact, disabled within meaning of the Social Security Act.” *Id.*

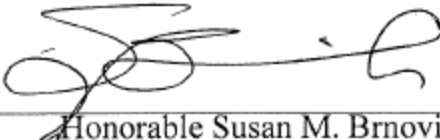
5 Though the ALJ erroneously rejected Dr. Abbas’s opinion, the Court finds that  
6 further proceedings would be useful for the ALJ to properly consider the opinion evidence  
7 prior to formulating Plaintiff’s RFC. Further, even if all elements of the credit-as-true rule  
8 were satisfied, the record as a whole—most evidently, the objective medical evidence—  
9 creates serious doubt as to whether Plaintiff is, in fact, disabled. Therefore, remand for  
10 further proceedings is the proper remedy.

11 **IT IS THEREFORE ORDERED** reversing the August 24, 2017 decision of the  
12 Administrative Law Judge. (R. at 15–35.)

13 **IT IS FURTHER ORDERED** remanding this matter for further proceedings  
14 consistent with this Order.

15 **IT IS FURTHER ORDERED** directing the Clerk of Court to enter judgment  
16 accordingly and terminate this matter.

17 Dated this 10th day of August, 2020.

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21   
22 Honorable Susan M. Brnovich  
23 United States District Judge  
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